

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-1240

**United States Court of Appeals
For the Second Circuit**

B
P/S

UNITED STATES OF AMERICA,

Appellee,

-against-

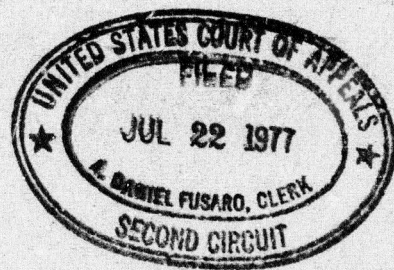
PRAVIT PIYACHINAVAN,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Eastern District Of New York*

APPELLANT'S BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

Docket No.
77-1240

PRAVIT PIYACHINAVAN,

Defendant-Appellant.
----- x

BRIEF FOR THE APPELLANT PRAVIT PIYACHINAVAN

PRELIMINARY STATEMENT

Pravit Piyachinavan appeals from a judgment of the United States District Court for the Eastern District of New York, rendered May 13, 1977, convicting him after trial (Bramwell, J. and a jury) of possessing with intent to distribute twelve (12) ounces of heroin in violation of 21 U. S. C. 841 (a)(1).

The appellant was committed to the care and custody of the Attorney General for a period of two (2) years, with a special parole term of eight (8) years.

The appellant, Pravit Piyachinavan, is presently enlarged on bail pending this appeal.

Gilbert Epstein, Esq., was assigned as counsel for the appellant pursuant to the Criminal Justice Act.

QUESTIONS PRESENTED

1. Whether the Court erred in denying appellant's motion to suppress on the grounds that the affidavit did not set forth facts and circumstances that would give the Magistrate probable cause to believe a crime was being committed and evidence of the crime was secreted in the second floor apartment at 25-42 23rd Street, Astoria, Queens?
2. Whether the Court erred in instructing the jury that knowledge could be found to exist based on a finding that one had wilfully or intentionally remained ignorant of a material fact?
3. Whether the Court erred in submitting the case to the jury on alternative theories, one of which was not supported by the evidence?

STATEMENT OF FACTS

The appellant, Pravitt Piyachinavan, was named in three (3) counts of a five (5) count indictment, filed on October 29, 1976,* charging him and a co-defendant, Teera Pamon,** with intent to distribute twelve (12) ounces of heroin, and conspiracy to possess with the intent to distribute a quantity of heroin. The importation count, Count II, was dismissed by the government prior to the selection of a jury, and a verdict of acquittal under Rule 29 was rendered by the Court on the conspiracy count, Count III, at the close of the government's case.

* This was a superseding indictment. The original indictment was filed on September 9, 1976.

** The co-defendant Teera Pamon had his case severed prior to trial.

Count I charged the appellant with possession with intent to distribute twelve ounces of heroin on or about the 31st day of August, 1976.

PRE-TRIAL MOTION TO SUPPRESS

Prior to trial* the appellant Pravit Piyachinavan moved to suppress the heroin seized in the second floor apartment at 25-42 23rd Street, Astoria, Queens on August 31, 1976.

The affidavit submitted to the United States Magistrate in support of the government's application for a search warrant for the subject apartment contained the following recital:

" WILLIAM OAKES, being duly sworn, deposes and says that he is a Special Agent employed by the Drug Enforcement Administration of the Department of Justice, duly appointed according to law and acting as such.

Upon information and belief, there is approximately one hundred and fifty three (153) grams of heroin hydrochloride, a schedule I narcotic drug controlled substance, at the upstairs floor of one two family house, premises known as 25-42 23rd Street, Astoria, Queens, New York. The presence of said narcotics is in violation of Title 21, United States Code, Section 841(a)(1).

The source of your deponent's information and the grounds for his belief are:

1. Seizure by United States Customs Officers on August 26th 1976, of a package that had arrived at John F. Kennedy Airport by mail from Bangkok, Thailand and addressed to one Shensooya/K,

* The motion to suppress the heroin seized in the second floor apartment at 25-42 23rd Street, Astoria, Queens, New York, was filed prior to the first trial of this indictment in January, 1977. All motions were renewed prior to the second trial.

25-42 23rd Street, Astoria, Queens. A drug field test revealed such package to contain approximately one hundred and fifty three (153) grams of heroin hydrochloride, a schedule I narcotic drug controlled substance.

2. Investigation by the Drug Enforcement Administration has disclosed that a citizen of Thailand resides at the upstairs floor of the above described premises.

3. Observation by agents of the Drug Enforcement Administration of an individual picking up the above described package at the United States Post Office servicing the above described premises, and carrying said package on 8/31/76 to such premises." (P.75-76).*

The appellant moved to suppress the contraband recovered in the subject apartment on the grounds that the affidavit did not set forth sufficient facts to give the Magistrate probable cause to believe a crime was being committed and evidence of that crime was present in the second floor apartment at 25-42 23rd Street, Astoria, Queens (P. 78). The government argued that the affidavit clearly spelled out why the DEA agents wanted to search (P. 81 - P. 84). The Court denied appellant's motion to suppress, finding there was sufficient probable cause for the issuance of a search warrant (P. 89).

* Numerals in parenthesis preceded by the letter "P" refer to the page numbers of the appellant's appendix.

THE TRIAL

The Prosecution's Case

Donald Hughes, a dog handler with the United States Customs Service at the Port of New York was the first witness for the government (24). * On August 25, 1976 the witness was working at Mail Annex number three at John F. Kennedy International Airport when he discovered approximately five ounces of heroin inside a photo album that was contained in a package mailed from Bangkok, Thailand (26-28). The package was received in evidence as government's exhibit one (29). Hughes then turned the package over to Special Agent Kenneth Keefe of the DEA (30-31).

Kenneth Keefe, a Special Agent with the Drug Enforcement Administration (DEA), was the second government witness (35). Keefe testified that inside the package, government's exhibit one, he found a photo album inside a blue case, and there were two plastic bags containing heroin in the album, one in each cover (38). Keefe, on August 30, 1976, removed the two bags containing heroin from the album and replaced them with two bags containing lactose, and a minute amount of heroin (40). Government's exhibit two in evidence consisted of the two bags in which the heroin was originally contained, the blue case and the photo album (41, 96). Government's exhibit

* Numerals in parenthesis refer to the page numbers of the trial transcript for March 22, 1977.

three in evidence consisted of the two bags of lactose (42, 96). Keefe then placed the bags of lactose in the photo album, one in each cover, and re-sealed the covers with glue and scotch tape (42). On August 31, 1976 Keefe and Postal Inspector Johnson took the entire package to a post office located on 21st Street in Astoria, Queens. Keefe and Johnson then gave a postal notice of an attempt to deliver a parcel to the route mail carrier to leave in the mailbox at 25-42 23rd Street (44). The notice of an attempt to deliver mail, bore on it the request that the party come to the post office to pick up this parcel. The postal delivery slip was government's exhibit number four in evidence (45, 48).

Government's exhibit four in evidence was addressed to a K. Shensooya at 25-42 23rd Street, and it contains the date, route number and a notice that two cents postage is due.

Government's exhibit five in evidence was a street diagram of the area of Astoria, Queens between 24th and 30th Avenues and 12th Street to 29th Street (46, 47).

Keefe stated that 25-42 23rd Street is located in the middle of the block between Astoria Boulevard and 25th Street on the west side of the street. The post office was located at 21st Street and 29th Avenue (48-49). Keefe parked his car on the east side of 23rd Street facing north, and testified that he saw the appellant for the first time sometime between 10:15 and 10:30 a.m. (50, 65), standing on the porch of the subject premises.

The appellant was next seen by the witness a few minutes after the mail carrier had exited 25-42 23rd Street, and the appellant approached the mail carrier and they spoke briefly (50, 51, 65). Upon leaving the mailman Keefe observed appellant walk north on 23rd Street to Hoyt Avenue where he turned right, walking east on Hoyt Street. About half-way down the block on Hoyt, the appellant made an about face and was now walking west on Hoyt. The appellant continued in this direction until he got to 21st Street, where he turned left (51, 66). On 21st Street the appellant walked south to the post office on 29th Avenue. While walking, the appellant, upon coming to a corner, would turn and look to his right and left (52, 67-68).

Keefe entered the post office prior to the appellant and saw him give government's exhibit four to the woman behind the counter, and Keefe heard her remark "twelve cents" (53). Keefe observed the appellant leave the post office carrying government's exhibit one and saw him walk north to Astoria Boulevard where he turned right and continued along Astoria Boulevard to the area where Crescent Street intersects (53). The appellant then entered a store, re-appearing about fifteen seconds later, when he started to walk back on Astoria Boulevard toward 23rd Street. At 23rd Street, the appellant turned right and proceeded diagonally across the street and entered 25-42 23rd Street. Keefe testified that he was still parked at Astoria Boulevard and 23rd Street, maintaining a "watch" on the subject premises while awaiting the issuance of a search warrant (55). The appellant

prior to re-entering the subject premises was seen wearing a pair of dungarees and a dungaree type jacket (54).

Keefe maintained a surveillance on the subject premises for approximately twenty minutes prior to entering those premises and saw no one enter or leave during that interval (55-56).

Upon being notified that a search warrant had been issued for the second floor apartment, Keefe and three other agents entered the house at 25-42 23rd Street. They proceeded through the front door and entered the vestibule. Pausing before a second door, which was locked (56, 69), Keefe rang the bell for the downstairs apartment. When the door was opened by a woman, Keefe identified himself, and with the other agents he climbed the stairs to the second floor apartment (55-56).

Keefe stated that he believed that the woman who opened the second door leading to the lobby was Greek because he had seen what he thought was a Greek name on the mailbox downstairs (56).

Upon reaching the second floor apartment, Keefe knocked on the door and when a voice said "who is it?" the response was "Federal agents" (56). The appellant, wearing a blue shirt and a "sarong", opened the door (57). Keefe testified that he left the appellant and the other agents in the kitchen, and went to see if there were others in the apartment. * Keefe walked down a

* On August 31, 1976, federal agents initiated surveillance on 25-42 23rd Street, Astoria, Queens at 7 o'clock a.m. At 7:20 a.m. Teera Pamon, the appellant's co-defendant and tenant of the subject apartment, was observed leaving the subject premises and going to his place of employment,

corridor to the living room where, on a couch, he recovered government's exhibit one. The photo album in government's exhibit one was lying on the couch, and a bag of heroin was laying on the album cover (58). In a small bedroom Keefe testified he found appellant's jacket hanging up. The appellant was placed under arrest after Keefe saw the bag with white powder (59).

There was no other individual in the subject apartment at the time of the appellant's arrest, except for the appellant and the four federal agents (60).

On cross-examination Keefe stated that he had not seen Mr. Piyachinavan prior to August 31, 1976 (62). Keefe also stated that the postal delivery slip, government's exhibit four, was placed in the mailbox at the subject premises shortly after 10 o'clock a.m., but he did not see the appellant until 10:15 or 10:30 a.m. (65). Keefe stated that he did not see the mailman make any movements during the appellant's brief meeting with him (65-66). Keefe testified that when he stated that the appellant hesitated at times, he meant that he saw the appellant stop at a corner, and look right and left (68). Keefe stated that Piyachinavan stopped at 25th Road and 21st Street and hesitated a second, and that "maybe" the appellant stopped for a second at 26th Avenue and 21st Street, possibly looking for traffic (68). Keefe stated there

* (continued from preceding page)

The Awisco Corporation, at 55-16 43rd Street, Maspeth, Queens. The agents continued surveillance on Pamon at his place of employment. (P. 92).

we: two mailboxes in the vestibule, one bore the name "Pamon", and the other mailbox bore a Greek name (70). Keefe stated that the entrance to the downstairs apartment was in the rear of the hallway behind the stairs leading to the second floor apartment. Keefe stated that he had been told by another agent that the second floor apartment belonged to Pamon (75).

Jeffrey Weber, a forensic chemist for the DEA, was the third government witness (92). He testified that government's exhibits two and three in evidence contained heroin (95-96).

Dwight S. Rabb, a Special Agent with the Drug Enforcement Administration, was the next witness for the government (99). Rabb testified that on August 31, 1976 he took up surveillance at about 7 o'clock a.m. of the area in Queens, New York on 23rd Street between Astoria Boulevard and Hoyt Avenue (104). Rabb stated that between 10:30 and 10:45 a.m., he saw the route mail carrier enter 25-42 23rd Street and exit within a few seconds. A few minutes later, according to Rabb, the mail carrier was stopped by the appellant (105). Rabb stated that the mail carrier during the conversation with the appellant, gestured with his right arm in the direction of Astoria Boulevard and made a curvature motion with his right hand (106). Upon leaving the mail carrier, Mr. Piyachinavan walked north on 23rd Street to Hoyt Avenue where he turned right (106-07). In the middle of the block, Mr. Piyachinavan made a u-turn and started to walk west on Hoyt until he got to 21st Street. After standing on

the corner for a few minutes, the appellant proceeded south on 21st Street until he entered the post office. Rabb stated that upon exiting the post office, the appellant would come to a corner and stop for a few seconds, looking back and forth (107-08). Exiting the post office Mr. Piyachinavan walked north to Astoria Boulevard, and proceeded east on Astoria Boulevard, passing 23rd Street until he came to a small grocery store which he entered. Mr. Piyachinavan left the store and returned to the house at 25-42 23rd Street (108). Rabb testified that the appellant was in the subject premises for 15 minutes before the agents were able to enter with a search warrant (108). Rabb stated after entering the building, the agents knocked on the door of the upstairs apartment, and after identifying themselves as federal agents, the appellant opened the door (109). The appellant was then taken by Special Agent Kibbel into the kitchen and placed under arrest (109). Rabb and the other agents then made a cursory search to see if anyone else was home. * (109)

Rabb stated that he saw government's exhibit one on the couch in the apartment, and that plastic bags of white powder were laying on top of the photo album (110). Mr. Piyachinavan was wearing dungarees, and a light blue shirt in the street, according to Rabb, and "oriental-style pajamas" from the waist down in the apartment (110, 111). Rabb stated that when Mr. Piyachinavan was getting dressed he retrieved some clothes from the

* Rabb had seen Pamon leave the subject premises at shortly after 7 o'clock a.m., and the premises had been under continuous surveillance since then (P. 92).

bedroom in the front of the subject apartment (111). Mr. Piyachinavan gave his address as being 556 46th Street, Woodside, Queens, and stated he was a Thai national when he was questioned concerning his pedigree after he was arrested (113).

Carl Collins, a fingerprint specialist with the Federal Bureau of Investigation, was the last government witness (M3-M4)*. Collins testified that he made an analysis for latent fingerprints on government's exhibit one, the photo album, the cardboard container and the mail wrapper (M5-M6). The witness stated that six latent fingerprints and a palm print were found on government's exhibit one, but none of them belonged to the appellant (M6). Collins testified that fingerprints are made by the secretion of perspiration from an individual's fingers, and the rate of evaporation would play a role in determining whether a latent fingerprint would remain on a surface, and on a non-porous surface the latent fingerprint would evaporate fairly readily (M6-M7). Collins stated that the mail wrapper and the cardboard container were porous, but plastic was non-porous (M7). Collins, on cross-examination, stated he conducted an analysis for latent fingerprints on government's exhibit three, glassine bags, but found none on the non-porous surface (M11).

The government rested its case (M14).

* Numerals in parenthesis preceded by the letter "M" refer to the minutes of the morning session of March 23, 1977.

The Defense Case

Samuel Croker, a letter carrier with the United States Post Office, was the only witness for the defense (21A)*. Croker testified that on August 31, 1976 he delivered government's exhibit number four, the failure to deliver parcel mail to the residence at 25-42 23rd Street (21A - 22A). Croker testified that about three or four minutes after he left the slip while making a mail delivery at 25-42 23rd Street, an "oriental looking person"*** came up to him waiving the slip he had just left and he told the man to go to the post office and pick it up (22A - 23A). Croker testified that while this conversation was going on, he was placing letters in the mailboxes, but that he did not give the appellant any directions on how to get to the post office (23A).

The defense case then rested (26A).

The jury returned a verdict of guilty after a few hours' deliberation (8d). ***

* Numerals in parenthesis followed by the letter "A" refer to the transcript of the Court proceedings for the afternoon of March 23, 1977.

** The witness was not able to identify the appellant.

***Numerals in parenthesis followed by the letter "d" refer to the trial transcript of March 24, 1977.

POINT I

THE COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS ON THE GROUNDS THAT THE AFFIDAVIT DID NOT SET FORTH FACTS AND CIRCUMSTANCES THAT WOULD GIVE THE MAGISTRATE PROBABLE CAUSE TO BELIEVE A CRIME WAS BEING COMMITTED AND EVIDENCE OF THAT CRIME WAS SECRETED IN THE SECOND FLOOR APARTMENT AT 25-42 23RD STREET, ASTORIA, QUEENS.

Special Agents of the Drug Enforcement Administration entered the second floor apartment at 25-42 23rd Street, Astoria, Queens on August 31, 1976 after being notified that the United States Magistrate in the Eastern District of New York had issued a search warrant for that apartment. Upon recovering a quantity of lactose, mixed with a minute amount of heroin, in the living room of that apartment, the appellant was placed under arrest. The appellant, prior to trial, moved to suppress the contraband seized in the subject apartment on the ground that the supporting affidavit was devoid of any recitation of facts that would give the magistrate probable cause to believe a crime was being committed or evidence of a crime was secreted in the second floor apartment at 25-42 23rd Street. The motion to suppress was denied. This was error. Nathanson v. United States, 290 U.S. 41 (1933); Giordenello v. United States, 357 U.S. 480 (1958); United States v. Spinelli, 393 U.S. 410 (1969); United States v. Karathanos, 531 F.2d 26 (2nd Cir. 1976).

Prior to issuing a search warrant, the Magistrate must have probable cause for believing that a crime occurred or is occurring and evidence of that crime is secreted in a specific premises, United States v. Harris, 403 U.S.

573, 584 (1971), and in determining whether probable cause existed the reviewing court may consider only information that was brought to the attention of the issuing magistrate. Giordenello v. United States, supra, 357 U.S. at 487; Aguilar v. Texas, 378 U.S. 108, 109, n.1 (1964); United States v. Cangiano, 491 F.2d 906, 912 (2nd Cir. 1974). The magistrate may issue a warrant to search only if he can find probable cause from the facts and circumstances presented to him under oath. Belief or suspicion will not suffice. Nathanson v. United States, supra, 290 U.S. at 47; Fed. R. Crim. P. 41 (c)(1).

The affidavit before the magistrate contained the following recital:

- " The source of your deponent's information and the ground for his belief are:
- " 1. Seizure by United States Customs officers on August 26, 1976 of a package that had arrived at John F. Kennedy Airport by mail from Bangkok, Thailand and addressed to one Shensooya/K, 25-42 23rd Street, Astoria, Queens. A drug field test revealed such package to contain approximately one hundred and fifty-three (153) grams of heroin hydrochloride, a Schedule I narcotic drug controlled substance.
- " 2. Investigation by the Drug Enforcement Administration has disclosed that a citizen of Thailand resides at the upstairs floor of the above described premises.
- " 3. Observation by agents of the Drug Enforcement Administration of an individual picking up the above described package at the United States Post Office servicing the above described premises, and carrying said package on 8/31/76 to such premises." (P. 75 - P. 76).

The affidavit in Paragraph One states that the subject package was addressed to a Shensooya/K at 25-42 23rd Street, Astoria, Queens. Neither the package, according to the affidavit, or the first paragraph of the affidavit itself, makes any reference to the second floor apartment at the subject premises.

The second paragraph merely states that investigation by the DEA discloses that a Thai national resides at the upstairs floor of the subject premises. There is no statement as to the actual source of this information, nor the basis for the source's belief. In the instant case, there is no statement as to who the informant is, when he obtained this information, or how the informant came by his information. It is well established in our law that the affidavit must show that the information provided by an informant must be based on his own recent knowledge, United States v. Harris, supra, 403 U.S. at 579, and that the affidavit must explain how the informant gathered his information, Spinelli v. United States, supra, 393 U.S. at 413; Jones v. United States, 362 U.S. 257 (1960).

The statement that the subject apartment was occupied by a Thai national as set forth in the second paragraph of the affidavit, makes no mention of the identity of the individual living there beyond his nationality.*

* The apartment was rented by Teera Pamon, the appellant's co-defendant, who was severed from the case prior to trial. Agent Keefe testified that when he entered the vestibule at 25-42 23rd Street on August 31, 1976 he saw two mailboxes, one with a Greek name, and the other bearing the

This second paragraph is "but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the Magistrate's decision". Spinelli v. United States, supra, 393 U.S. at 414.

The third paragraph in the affidavit details that agents saw an individual pick up the intercepted package at the post office, and enter the premises at 25-42 23rd Street with the package. The affidavit makes no reference to the nationality of this individual**. The affidavit does not indicate which of the two apartments in the subject premises the individual with the package entered, only that he entered the premises itself.

The testimony at the trial of Special Agent Keefe states that when the appellant returned to the premises at 25-42 23rd Street with the package, the agents were situated at the corner of Astoria Boulevard and 23rd Street (54-55), and the subject premises was located on the west side of 23rd Street halfway up the block (105). Moreover the door leading from the vestibule into the lobby was locked (56). The agents on August 31, 1976 could not see which of two apartments the appellant entered.

This is not an instance where there was a slight variance between the affidavit and the search warrant as in United States v. Campanile, 516 F.2d 288, 291 (2nd Cir. 1975), but rather this is a situation where the

* (continued from preceding page)

name "Pamon" (56, 69, 70). The Magistrate, however, was not informed that this apartment was Pamon's, Pamon's role in the case, or his name being on the mailbox.

** The appellant, a Thai national, picked up the package at the Post Office. The Magistrate was not informed of the nationality of the individual who picked up the package.

affidavit fails to establish probable cause for the search of the second floor apartment. There is no factual statement in the affidavit that would give a magistrate probable cause to believe a crime was being committed or evidence of a crime was secreted in the second floor apartment at 25-42 23rd Street.

The government, in its argument before the District Court, relied solely on the fact that the affidavit provided probable cause for the search of the subject apartment, yet in admitting that certain facts had not been presented to the issuing magistrate the prosecutor argued:

" There is nothing in Koranthos; there is nothing to Spinelli that says that the United States has to give its total thought process as to the specific part of the premises. What the circuits have asked is for us to prescribe a specific part of the premises." (P. 82 - P. 83).

The government offered no explanation then or later as to why it would not set forth its total thought process in an ex parte proceeding before a United States Magistrate, but obviously preferred to have the Magistrate use his imagination to supply essential details necessary to a determination of the existence of probable cause. The government, having elected to proceed on this perilous course, must now bear the consequences of this fatal deficiency. United States v. Karathanos, supra, 531 F.2d at 31.

It is clear from the testimony, and the comments by government

counsel during the trial itself, that entry to the second floor apartment was made only after a search warrant was issued, and was made under the authority of that warrant. In his closing remarks, government counsel commented:

" Because the agents had the power to go into the apartment because a search warrant had been issued they went in. "
(P. 119).

The government at no time, during or before the trial, ever urged or argued that the search and seizure of contraband in the subject apartment was permissible under one of the "exceptions" to the warrant requirement of the Fourth Amendment.

POINT II

THE COURT ERRED IN INSTRUCTING THE JURY THAT KNOWLEDGE
COULD BE FOUND TO EXIST BASED ON A FINDING THAT ONE HAD
WILFULLY OR INTENTIONALLY REMAINED IGNORANT OF A
MATERIAL ACT.

The court informed counsel that it would charge the jury that one may not wilfully and intentionally remain ignorant of a fact important and material to his conduct in order to escape the consequences of the criminal law. Appellant's counsel objected to this portion of the charge stating that the evidence did not establish that there was a "high probability" that the appellant "knew" what the package contained. The court overruled the objection. This was error. United States v. Bright, 517 F.2d 584 (2nd Cir. 1975); United States v. Jewell, 532 F.2d 697 (9th Cir. 1976).

"Wilful blindness" can only be found where it can almost be said that the defendant actually knew the true state of affairs. United States v. Jewell, supra, 532 F.2d at 704. There must be proof of a high probability that the accused has knowledge of the existence of a particular fact. United States v. Bright, supra, 517 F.2d at 587. In light of counsel's objection which stressed the absence of a high probability that the appellant knew the package contained heroin, the Court should have included the phrase "high probability" in its remarks to the jury. Alerting the jury that the standard of proof is sufficiently high so that it can only be satisfied by a finding that the appellant actually knew

what the package contained.

The Court's instruction to the jury on this point actually diluted the very high standard of proof required for a finding of knowledge and lowered the government's burden of persuasion. United States v. Gentile, 530 F.2d 461, 469 (2nd Cir. 1976).

The Court instructed the jury, in part, as follows:

" You may find a defendant acted knowingly if you find that either he actually knew he had narcotics or that he deliberately closed his eyes to what he had every reason to believe was the fact. "

Thus a jury could easily conclude that something less than knowledge of what was in the package would suffice in order to return a verdict of guilty.

In this case the specific issue, indeed the only real issue for the jury to decide, was whether Mr. Piyachinavan knew that the package contained heroin when he went to get it at the post office. This is not a situation where the appellant was under a specific duty or obligation to discover the true state of affairs about the package. The facts that were before the appellant when he obtained the postal delivery slip and the situation that existed when he picked up the package bearing the legend "Birthday present" at the post office, were not of a suspicious nature. United States v. Natelli, 527 F.2d 311, 323 (2nd Cir. 1975).

In light of the facts in this case as they were unfolded in front of the jury, this portion of the charge should have been omitted.

The Court, moreover, never charged the jury, as it was required to do, that if the jury found that the appellant believed that the package contained only "innocent" items, i. e. , "a birthday present", when he picked it up at the post office, he was entitled to a verdict of acquittal. United States v. Bright, supra, 517 F. 2d at 587, 588; United States v. Natelli, supra, 527 F. 2d at 322.

The failure of the trial court, after objections by appellant's counsel, to charge the jury that they must find that appellant's knowledge of a specific fact is shown by proof of the individual's awareness of a high probability of its existence, coupled with the court's failure to balance this portion of the charge by telling the jury that if they find the appellant actually believed that the package contained an "innocent" item, they must acquit, allowed the prosecution to convict the appellant on something less than actual knowledge, and deprived him of due process of law. United States v. Christmann, 298 F. 2d 651, 653-54 (2nd Cir. 1962).

POINT III

THE COURT ERRED IN SUBMITTING THE CASE TO THE JURY ON
ALTERNATIVE THEORIES, ONE OF WHICH WAS NOT SUPPORTED
BY THE EVIDENCE.

The trial court instructed the jury that they could find the appellant guilty of the only charge against him, possession with intent to distribute a Schedule I narcotic drug controlled substance, either as a principal or as an aider and abettor. Defense counsel objected, prior to the charge, to the court's instructing the jury that the appellant could be found guilty as an aider and abettor on the grounds that there was no evidence to sustain the giving of this charge. The court's charge in this regard was erroneous. Yates v. United States, 354 U.S. 298, 312 (1957); United States v. Adcock, 447 F.2d 1337, 1338-39 (2nd Cir. 1971); United States v. Rodriguez, 465 F.2d 5, 10 (2nd Cir. 1972).

The appellant was originally indicted in Count I of this indictment with one Teera Pamon, both of whom were charged with possession with intent to distribute a quantity of heroin. Pamon's case was severed prior to the appellant's first trial. The Court in its opening remarks to the jury made no mention of any other individuals connected with the trial of this case. The government, in its opening remarks to the jury, cautioned the jury not to be confused by other names that may be thrown around or by other people that might be thrown into it, but to be assured that the government's simple

evidence was "going to concentrate on what this defendant did and that is what the case would involve" (P. 141).

In the trial itself, the only mention that was made of other individuals, besides the appellant, was the testimony of Special Agent Keefe that he saw the name "Pamon" on one of the mailboxes in the vestibule of 25-42 23rd Street, and he had been informed by another agent that the second floor apartment at the subject premises was occupied by Teera Pamon. The only reference to "Shensooya" was that his name appeared as the addressee on Government's Exhibit One. There was no evidence before the jury to show that Pamon had "in some sort associated himself with the venture, that he participated in it as in something that he wishes to bring about; that he sought by his action to make it succeed." United States v. Peoni, 100 F.2d 401, 402 (2nd Cir. 1938).

The Court, in the course of its charge, told the jury the following:

" Aiding and abetting:

" In a cause where two persons are charged with the commission of a crime such as Count I here, where Pravitt Piyachinavan is charged with Teera Pamon, the guilt of the defendant may be established without proof that he personally did every act constituting the offense charged . . .

" In order to aid and abet another to commit a crime, it is necessary that the accused wilfully associate himself in some way with the criminal venture and wilfully participate in it as he would in something he wished to

bring about. That is to say, that he wilfully seek by some act or omission of his to make the criminal venture succeed."

The Court instructed the jury that they could find the appellant guilty if they found that he had aided and abetted Teera Pamon. There was no evidence to support the giving of such an instruction.

In United States v. Johns, 444 F.2d 58, 59 (5th Cir. 1971), the Court, in a per curiam opinion, held that where defendants had been indicted for travelling and causing others to travel in interstate commerce for the purpose of carrying on an illegal gambling operation, and the Court charged the jury that the interstate travel aspect of the charge might be made out by proving either that the defendants themselves travelled in interstate commerce or that they caused patrons of their gambling establishment to travel in interstate commerce. This charge allowed the jury to find the defendants guilty on the basis of the interstate travel of the customers. Since this evidence could not make out the interstate travel element of the offense, the court reversed the judgment of conviction stating:

" The Supreme Court has held that a verdict must be set aside 'where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected. "

In United States v. Adcock, 447 F.2d 1337 (2nd Cir. 1971), the panel of this court rejected the government's contention that the judgment could only be reversed where it was submitted to the jury on alternative theories,

one of which had an unconstitutional basis.*

The Court rejected the government's contention and held that where a case was submitted to a jury on alternative theories, and the evidence did not support one or more of those theories, the judgment would be reversed.

The Court, in this case, indicated at the charge conference, when counsel objected to the giving of the instruction on aiding and abetting, that it believed that the jury could find that the appellant had aided and abetted Shensooya. In the charge the only reference made by the Court of an individual other than the appellant, was of Teera Pamon. The only way that the jury could conclude that Teera Pamon had any criminal participation in this matter would be from his name appearing on the indictment itself. There was no evidence at the trial from which the jury could conclude that Pamon played a criminal part in this matter.

The jury returned a general verdict and there is no way of knowing whether the appellant was convicted as an aider and abettor or a principal.

* See Appellee's brief, United States v. Adcock, Docket No. 71-1289, pp. 12-13.

CONCLUSION

For the above-stated reasons, the judgment below should be reversed with a direction to the District Court that the indictment be dismissed or in the alternative an order reversing the judgment of conviction and directing a new trial.

Respectfully submitted,

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EPSTEIN

STATE OF NEW YORK)
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COUNTY OF RICHMOND)

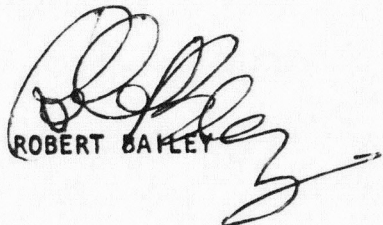
ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 22 day of July 1977 deponent served the within *Brief* upon

U.S. Atty., East. Dist. of NY

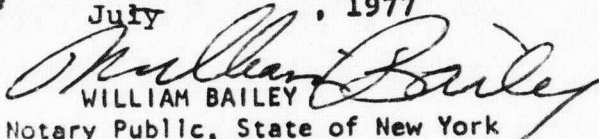
attorney(s) for
Appellee

in this action, at
225 Cadman Plaza East, Brooklyn, NY

the address(es) designated by said attorney(s) for that purpose by depositing
_____ copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 22 day
of July, 1977


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

